LIMITATIONS UPON THE POWER OF THE LEGISLATURE TO CONTROL POLITICAL PARTIES AND THEIR PRIMARIES

THE convention system of nominating candidates for public office is, in a great degree, peculiar to the United States. England has in recent years borrowed in part our caucus, but as late as 1893, a writer in the *American Law Register*[1] says:

"A nomination is made in the British dominions by a paper filed by one person and one or a very few seconders."[2]

Nor have we always had the convention system here. The first national nominating convention was held in Baltimore, by the anti-Masonic party, on September 26, 1831.

In colonial days, in the South, candidates were as a rule self announced, a method which Dallinger says continued to be the mode of nomination down to the Civil War.[3]

In New England, the caucus did its work. Says John Adams in his interesting diary:—

"This day learned that the caucus club meets in the garret of Tom Dawes, the Adjutant of the Boston Regiment. He has a large house and he has a movable partition in his garret which he takes down and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip, I suppose, and then they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, wardens, fire wards and representatives are regularly chosen before they are chosen in the town. . . . They send committees to wait on the Merchant's Club and to propose and join in the choice of men and measures."[4]

Says Gordon in his History of the American Revolution quoted in this same diary:—

"More than fifty years ago, Mr. Samuel Adams' father and twenty others . . . used to meet and make a caucus and lay their plans for introducing certain persons into place of trust and power. When they had settled it, they separated and used each their particular influence with his own circle. He and his friends would furnish themselves with ballots, including the names

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[1] 32 Am. L. Reg. 161.

[2] "The nomination is made in writing, each candidate being proposed and seconded by a registered elector for the constituency. The names of eight other registered electors must be affixed to the nomination papers as assenting to the nomination." Anson, "Law and Custom of the Constitution," Vol. I, page 133. For a fuller discussion of this subject see Courtney "Working Constitution of Great Britain," Ch. 15.

[3] Dallinger "Nomination for Elective Office in the U. S." p. 4.

[4] J. Adams' Diary, 1850 ed. Vol. II, 144.

of the parties fixed upon, which they distributed on the day of election. By acting in concert, together with a careful and extensive distribution of ballots, they generally carried the election to their own mind."

In the early part of the century nominations for state and federal officers were made by legislative caucuses; the President being nominated first by congressional and later by state legislative caucuses. This was objected to as being undemocratic. It was the era of the "Demos Krateo" and the individual voter demanded a voice in the nomination. Says Niles in his Weekly Register:—

"As my soul liveth, I would rather learn that the halls of Congress were converted into common brothels than that caucuses of the description stated should be held there. I would rather that the sovereignty of the states should be transferred to England than that the people should be bound to submit to the dictates of such an assemblage. . . . The great mass of the people feel that they are able to judge for themselves, they do not want a master to direct them how they shall vote."

The result of this was the establishment in this country of the "convention system" of nomination. In its train has come the machine, for "given party loyalty and the nominating convention the machine follows as a natural result."

With the tremendous growth of our country and the extension of the franchise, the convention system with its attendant primary and delegate has made necessary the highly organized political party of to-day.

Few people realize the significance of the convention in American history. There are few things says the "Nation" more curious in American political history than the elevation of the nominating convention to the rank of an institution.[1]

Slowly and quietly coming into existence, entirely unrecognized by the constitution or laws, it has grown and developed until to-day it is one of the great extra-constitutional political institutions of the land. The organized political party, as Professor Goodnow points out, is doing here work done by the government in England. Office holders are responsible primarily not to the people but to the "party." The political party is more than an organization to secure the "loaves and fishes." It is a great political institution, an important political organ sharing the work of government. What the future of this will be it is difficult to say, but if it continues to grow in importance, there is no reason, as some one has said, why it should not occupy as well recognized a place and be as distinct a political organ as the House of Representatives itself.

[1] Nation, Vol. 22, p. 240.

Mr. E. L. Godkin, one of the most profound observers upon our political life, has said:—

"The establishment and growth of the nominating convention in truth constitute the capital fact of modern democracy in America. Of no other political phenomena has the influence on the government or on the character of public men been so powerful. It is effecting a change in our political manners of which there is no parallel. But there is nothing in American history of the progress and consequence of which there appears to have been so little prescience. There is no mention or allusion either in DeTocqueville or in any of our earlier writers as to its probable or possible effect. One finds no allusion to it in any of the commentators on the constitution early or late".[1]

The right to nominate is as much a part of the franchise as the right to elect. The state has taken care to secure to the individual the right to elect; the right to nominate has been given over entirely to the "party" control. Not until the election day does the law take hold. Before that the entire procedure has been in the hands of an irresponsible, voluntary association called "party." A political party has been a law unto itself, governed by rules of its own making. The courts as a general thing refuse to exercise any control over it. Most of the courts have decided that the decision of the highest authority within a party as to party matters is final.[2] The Colorado courts undertook to exercise some control,[3] but by a recent statute, the settlement of all party controversies is taken from the court and put in the hands of the state central committee and of the state convention.[4] The same kind of a statute has been recently passed in California.[5]

The institutionalizing of the convention and the possession of so much power by an irresponsible, voluntary association has in many ways resulted disastrously. The primary is a constituent part of the convention and so has come completely under the control of the "party." The individual voter no longer has any voice in the nomination of candidates. Twenty-five leading republicans made an examination into the character of the republican primaries of New York in 1895, and their report shows that frauds in the greatest scale were practiced; that "large number of persons voted who had no right to do so, and that an enrollment secured in this way was unworthy of serious attention." In cities the number of

[1] "Unforeseen Tendencies of Democracy."

[2] Phelps *v.* Piper, 48 Neb. 724, 33 L. R. A. 53. Also see Goodnow, "Politics and Administration" p. 206.

[3] 25 Col. 302, 308, 407, 423, 447, 456, 461, 462, 469, 474, 481.

[4] Laws of Col. 1901, chapter 71.

[5] Laws of Cal. 1901, Ch. 187.

those who attend primaries is rarely one-third of those who have a right to do so. The corruption of the primaries is, however, too well known to need proof.

The result of this has been a demand for reform.

As early as 1863 the Union League Club of Philadelphia offered prizes for the four best essays on the "Legal Organization of Parties for Selecting Candidates for Office." Within recent years many of the states have passed primary election laws and more are contemplating doing so. Many of these laws are mandatory in their nature and control in detail party primaries. Other laws have also been passed which control the party organizations. All of these laws are but a recognition of the fact that a party is not a mere voluntary association but a political organ and as such should be recognized and controlled by law. The legalization of the party seems to be the next step in this interesting political phenomenon.

These primary election laws have, however, been attacked as being unconstitutional. The California court[1] has declared unconstitutional three such laws[2] and very recently such a law was declared invalid by an Oregon court.[3] The very important question arises then: Is there any limit to the power of the legislature in its control of political parties and their primaries? The importance of this question is, I think, self-evident.

That laws looking to the control of party nominations are a fit subject for legislation, cannot be doubted. The only question is as to the extent of the power.

In 1886 the legislature of Colorado had before it a "Bill for an act to prevent frauds in nominating public officers." Having doubts as to its constitutionality, it submitted to the supreme court for answer the following questions:—

1. Is it constitutional to enact any law attempting to regulate the machinery of a political party in making nominations of candidates for public office?

2. Can such a law take cognizance of political parties as such?

3. Can the law interfere in any wise with the modes and methods employed by a political party in the nominations of its candidates for public office?

4. Are the provisions of the bill properly the subject matter of legislation?[4]

[1] Gett *v.* Supervisors of Sacramento, 111 Cal. 366; Spier *v.* Baker 120 Cal. 370, 52 Pac. 659. Britton *v.* Board of Election Commrs. 129 Cal. 337, 61 Pac. 1115.

[2] Cal. has adopted (1901), a constitutional amendment giving the Legislature the power to pass a "Primary Election Law" so that doubtless the new law of 1901 will be upheld.

[3] Circuit Ct. of Multnomah Co. Sept. 21, 1902. See Meyer's Nominating Systems, page 363.

[4] 9 Col. 631.

The question is here fairly raised. It is to be regretted that the Colorado court did not discuss in full the questions involved. They came, however, to the court, not in a case but from the legislature, so the court contented itself by saying:—

"We do not find any constitutional objection to the bill submitted for our consideration, nor is our attention called to any provision in the constitution forbidding such legislation. The abuses sought to be corrected by the provisions of the bill are of the gravest character and are a proper subject of legislation, entirely within the legislative power."

The Pennsylvania supreme court had occasion to pass some time before this upon a similar bill.[1] It was there contended that such a bill was unconstitutional.

"What power then has and whence is it that the general assembly may enact laws fixing the holding of and providing for what it is pleased to term primary elections."

The court answered:—

"The proposition that the legislature may not prohibit and punish frauds at primary elections and nominating conventions is certainly a novel one. . . . To say that the legislature may not lay its hand upon a public evil of such vast proportions is to say that our government is too weak to preserve its own life. There is not a line in the constitution that in express terms or by any reasonable implication forbids this legislation."

What, if any, are the limits to this power?

It is the theory of our government that the states have all power not granted to the federal government or denied to the states by the federal constitution. The people of the states in their constitutions give to the legislature their power of legislation. It is a sound rule of construction, therefore, that a state legislature has all power of legislation not denied to it. This denial may be either express or implied. The extent, therefore, of the power of the state legislature to control parties and their primaries and nominating conventions is unlimited unless expressly or impliedly limited by the state or federal constitution. It should be remembered, however, that a state constitution is both a grant and limitation of power. It, in the first place, grants to the legislature in general terms the power of legislation and then proceeds to limit the grant thus generally made. The significance of this will be seen later on.

There are no limitations in the federal constitution on this power of the legislature we are discussing. What limitations are to be found in the state constitutions?

The express limitations in the constitutions of the various states

[1] Leonard *v.* Commonwealth, 112 Pa. St. 607.

naturally differ. There are some, however, that are common to most, if not all.

I. Any legislation of the state concerning primaries must be general, not local or special.

The primary election law of 1895 in California was declared unconstitutional as being local and special. Said the court[1]:—

"There can be no question that the act is local and special since by its terms it is to apply, to take effect in and be in force only in counties of the first and second class, that is to say, in San Francisco and Los Angeles."

The California constitution specifically forbids local legislation in thirty-four enumerated cases, among them being:—

"Laws providing for conducting elections, or designating the place of voting, except in the organization of new counties."

Also:—

"In all other cases where a general law may be made effectual."[2]

This point was more thoroughly discussed in a recent Oregon case.[3] Here the court was called upon to pass on a law, "providing a method of holding elections in cities having a population of 10,000, or more, as shown by the last state or federal census." Portland was the only city of this size. It was contended, therefore, that the act was special and local, since "by the express terms of the act it was intended to have operation in the city of Portland alone, and it can never extend to, or include other cities, should they come to have or possess as great or larger population."

Said the court:—

"If such is the true intendment of the act, the point would be well taken, for it may be stated as a positive rule of general application that all acts, or parts of acts, attempting to create a classification of cities by population, which are confined in their operation to a state of facts existing at the date of the adoption, or any particular time, or which by any device or subterfuge, exclude other cities from ever coming within their provision; or based upon any classification which in relation to the subject concerned is purely illusory, or founded upon unreasonable, obnoxious, or ill-advised distinctions, are ineffectual, as not being founded in substance; are inimical to the constitutional interdiction against special and local legislation, and are therefore null and void."

The court held, however, that the act was not invalid, since it did not limit the operation of the act to one city alone, to the exclusion of other cities that might subsequently acquire the prescribed population, nor was the classification founded upon some

[1] Marsh *v.* Hanly, 111 Cal. 368.

[2] Cal. Const. Art. IV sec. 25.

[3] Ladd *v.* Holmes,—Ore.—, 66 Pac. 714 (1901).

fanciful distinction, but was a real and substantial one, suggested and prompted by reason and experience. This being the case, the act was not local and special, for a "law may be general and have but a local application, and it is none the less general and uniform because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted," and if the classification be not arbitrary, but "have as a mark of distinction something of substance, some attendant or inherent peculiarity calling for legislation suggested by natural reason."

This seems to be a fair statement of the generally accepted rule.[1]

In the Oregon case upholding the Lockwood law, the words "last state or federal census," were held to mean not the census preceding the adoption of the law—which would make a fixed class and therefore be local and special legislation—but rather the census as taken from time to time. The words "last preceding census" were held by the Indiana courts to mean the same thing.[2] In Ohio the court held that the words "last federal census," meant the federal census last taken prior to the passage of the act, making the act local and special.[3]

In states which do not have, in their constitutions, inhibitions upon local and special legislation this question probably would not arise. Michigan, doubtless, could enact a primary election law which would apply to Detroit, alone, and forever exclude all other places.

II. Legislation concerning caucuses and nominations must not unreasonably discriminate between political parties.

Said the Minnesota court in a recent case[4]:—

"We are of the opinion that the legislature may classify political parties with reference to difference in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages, and deny them to another class and hamper it with unfair and unnecessary burdens and restrictions in the selecting of its candidates."

The principle is easily stated, and will be readily admitted to be a sound one. Its application, however, is most difficult, for it is

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[1] 41 L. R. A. 337 and cases there cited. See also Meyer's "Nominating System," p. 376 and cases there cited.

[2] Mode *v.* Beasley, 143 Ind. 306; Indianapolis *v.* Navin, 151 Ind. 139, 41 L. R. A. 337.

[3] Mott *v.* Hubbard, 59 Ohio St. 199; State, ex rel. Atty. Gen. *v.* Anderson, 44 Ohio St. 247; State ex rel. *v.* Mitchell, 31 Ohio St. 592.

[4] State *v.* Jensen (1902),—Minn.—,89 N. W 1126.

impossible to lay down any rule that will determine what is, and what is not, a reasonable discrimination. This is one of the many cases where the great power must be left in the courts, of deciding what is and what is not reasonable.

The California court declared the primary election law of 1899 to be invalid,[1] among other reasons because it made such discrimination. The law was confined in its operation to political parties which cast at the preceding election at least three per cent of the total vote.

"In other words," said the court, "no matter how well organized a small political party may be, no matter how devoted its adherents may be to its tenets, they are denied a representation upon the primary ballot, cut off from all benefit of the law, prohibited from holding a nominating convention (because only under the provisions of this law can such a convention be held), and are thus absolutely debarred from the privilege and protection accorded to other political parties. It is no answer to say that they may still cause the names of their nominees to be placed on the election ballot by petition. The objection is not that they may not in some way preserve this important right, but that they are denied the means to accomplish this result by holding a convention, while other political parties, no differently situated, saving that they are numerically stronger, are given the right and protected by the machinery of the law in its exercise."

The California court seems to stand alone in this position. In the Minnesota case cited above, the court upheld a similar discrimination, only instead of three per cent of the total vote, ten per cent is required. Said the court:—

"While it seems to some of us that the per cent of the vote selected as the basis of classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification is arbitrary."

Aside from the California case no instance can be found where the courts have declared such legislation void, as being an unreasonable discrimination between parties. All the primary election laws confine their operations to parties having polled at the last election, a certain percentage of the total vote, and with the exception of California, all have been upheld in this particular. The legislature has a right to discriminate between parties on account of their numerical strength, and say how each shall choose its candidates. The denial of the right to use the nominating convention as a means, is no denial of a constitutional right; nor is it an unreasonable discrimination. The nominating convention, as has been seen, is a novelty in democracy, and is in no wise an essential part. The

[1] Britton *v.* Board of Commrs., 129 Cal. 342.

right to nominate is an essential part of democracy, but so long as the law affords one reasonable means of exercising this right, no constitutional privilege is violated. This is true of any constitutional right. As long as the law affords one reasonable way of exercising it, the right is preserved. One can not complain that he has not a choice of means, nor that he has not the same means that some one else differently situated has. If the legislature thinks that nomination by petition is best suited to parties polling less than three or even ten per cent of the votes, and by convention, those polling more, the legislature has a right to make this discrimination. The convention has become such an institution that men are apt to think it sacred, whereas, as said before, it is in no wise an essential part of the democratic scheme of government.

Although the legislature has the right to make such and other reasonable regulations, the principle laid down in the Minnesota case must be true, and any discrimination which is arbitrary and unreasonable, must render the law invalid. The difficulty of determining what is reasonable discrimination does not disprove the truth of the principle involved. This must be decided first by the legislature, but the court must have the power, after giving all due deference to the opinion of the legislature, to decide the matter finally for itself.[1].

III. Legislation concerning caucuses and nominations must not interfere with the constitutional right to vote.

The right to vote is not a natural or inherent right but when granted by the constitution is considered one of the most sacred, and any legislation that abridges it must be void.

Many state constitutions in describing the qualification of electors declare that such persons shall be eligible to vote at "all elections authorized by law." The question arises at once: Is a primary election, under a mandatory primary elective law such an election? There can be no doubt that aside from such a law a primary election is not such an election. This question has arisen in connection

[1] This whole question was threshed out during the discussion of the constitutionality of the Australian Ballot Law. It was there argued that the law was invalid because it discriminated between parties, in that it provided that only parties polling a certain vote at the last election should have a place on the official ballot. There were a very few courts that upheld for a time this contention, and a good many dissenting opinions were given in its favor, but it soon came to be the settled opinion that such a discrimination was but a reasonable regulation and therefore valid. McCrary on Elections, 4th ed. p. 507; See also Constitutionality of Australian Ballot, annotated case, Bowers *v.* Smith, 16 L. R. A. 754.

with laws punishing certain offenses "at all elections." The courts have uniformly held that this does not include offenses committed at primary elections. Said the New Jersey court in *Woodruff* v. *State*,[1] a recent case:—

"A primary is not an election in the sense of the common law, but the election at which the fraud is committed to constitute a common law offense must be a popular election."

It is different, however, when the primary is recognized and regulated by law. It then becomes an election "authorized by law" and all constitutional electors have the right to vote thereat. Said the California court in *Britton* v. *Commissioners*[2]:—

"That a compulsory primary law forms a part of the general election law of the state, is not, we think, debatable and has been distinctly decided."

Said the Oregon court in *Ladd* v. *Holmes*[3]:—

"It seem hardly a matter of serious controversy that the elections presently provided for are such as are authorized by law."

"This being so it is clearly not within the power of the legislature to prescribe qualifications for voting at primaries which either enlarge or contract the qualifications laid down in the constitution for voting at "elections authorized by law."

This limitation must be said to exist whether the primary be an election or not within the meaning of the constitution. It is at least a nomination and those who have a right to vote at the final election must have a right to vote at the nomination of candidates who are to stand at that election. There are those who seem to think that the right to vote means simply the right to choose at election day between two or more candidates. This is manifestly wrong. The right to elect must include the right to nominate. A law would plainly be unconstitutional that provided that an altogether different body of men should nominate from those to whom the constitution gave the right to elect. A law that gave to two or three persons in a community the right to nominate candidates whom the constitutional electors should choose from would plainly be invalid. If it be unconstitutional to debar the body of constitutional electors from the right of nomination it is equally unconstitutional to debar a single constitutional elector from that right. Mr. Binney rightly says:—

"Clearly the right of nomination cannot be impaired without affecting the right of voting."[4]

[1] 52 Atl. Rep. (N. J.) 294 (1902). See also Commonwealth *v.* Wells, 17 Weekly Notes and Cases 164.
Leonard *v.* Commonwealth, 112 Pa. St. 622; People *v.* Cavanaugh, 112 Cal. 674.
[2] 61 Pac. 1115 (1900). [3] 66 Pac. 714 (1901). [4] 32 Am. Law Register, 106.

This then is a clear and important limitation upon the power of the legislature to control party primaries. Assuming that the primary is an "election authorized by law" the California court in *Spier* v. *Baker* [1] declared void the primary act of 1897. Sec. 23 of the statute allowed those to vote at the primaries who did not have the constitutional qualifications of voters. This was held invalid as extending the constitutional qualifications. Sec. 22 of the statute provided that—

"No person shall be allowed to vote at such primary elections whose name does not appear in the great or precinct register of the county or the city and county, used at the last general election, or upon the supplements to such great or precinct registers."

This was held unconstitutional as barring from the primaries those who by the constitution had the right to vote. The court enumerated six classes of voters thus barred.

While it is clear that the state may not abridge the right of constitutional voters to vote at primaries, whether we consider the primaries as elections or not, it is equally clear that the state may make reasonable regulations concerning this right. What is a reasonable regulation and what amounts to an unwarranted interference with this right, is as in all such cases, difficult to state. Judge Holmes has well said:—

"Here as elsewhere (it might be said especially in matters of constitutional law, were the fact not universal,) it is vain to point out that the difference upon which a legal distinction is based—here the difference between seemingly useful or harmless legislation and a clearly void restriction—is one of degree, and to ask, where are you going to draw the line? Some legislation is permissible and necessary. A line between cases differing only in degree is worked out by the gradual approach of the decisions, grouped about the opposite poles"

Following this method of determining what regulation of voting at primaries is valid and what is not, we turn to the cases. They are but few in number.

It was contended in Oregon that the recent Lockwood primary law [2] was unconstitutional in that it restricted constitutional electors to voting at their own party primaries. The attorneys argued that a primary is an election and therefore any constitutional elector can vote at any primary. A republican primary is an election authorized by law, therefore a democrat must be allowed to vote at this election, else he is denied the constitutional right to vote at "all elections authorized by law." The court very sensibly refused to accept such cavilling sophistry. It said:—

[1] 120 Cal. 375.

[2] Ladd v. Holmes, —Ore.—, 66 Pac. 714 (1901).

"It is not true that every citizen accorded the elective franchise under the constitution is entitled to vote at all elections. A citizen of one county is not entitled to vote at an election held in another county for local offices and a citizen of one precinct is not entitled to vote in another, nor of one city or town in another; so that the right of all electors to vote does not extend to all elections authorized by law but is dependent largely upon the place of residence and the nature of the election to be held; it is not a violation of the constitution that all electors are not permitted to vote at a particular party election. We see no objection to the legislature providing for party elections and limiting the electoral privilege to party members."

Chief Justice Holmes in a recent decision in Massachusetts,[1] discusses this question. It was contended there, as in the California case, that the primary law made requirements for voting higher than those laid down in the constitution. The law provided for the use of voting lists as check lists and denied the right to vote to those whose names did not appear on the list. It was suggested by counsel that the registration might be closed twenty days before the caucus so that persons who become qualified in the interim would not be allowed to vote. The court did not seem to consider this as fatal, for it said:—

"For the purposes of a preliminary meeting, this again does not seem to us an unreasonable precaution and we cannot say as a matter of law that the time allowed is unreasonable."

There seems to be an irreconcilable conflict between this and the California decision, but a closer investigation will show that this is not so. In the California case the regulation was clearly an unreasonable interference with the constitutional right to vote. In the Massachusetts case, while it is true Judge Holmes does not seem to attach the significance to the primary we think he should, nevertheless his decision does not disturb in the least the principle, for the regulation there was in his opinion but a reasonable one, and would probably have been upheld by him if, instead of a primary, it had applied to a final election. Rather do these two cases illustrate the principle, showing what is and what is not a reasonable regulation of the election franchise.

This is the extent of the judicial discussion of the subject. What the courts are likely to hold to be reasonable regulation may be seen by analogy in the decisions in regard to registration laws. The validity of such laws is questioned in some states. Pennsylvania has adopted (1901) an amendment enabling the legislature to require personal registration in cities and West Virginia has submitted to

[1] Commonwealth *v.* Rogers,—Mass.—, 63 N. E. 423 (1902).

vote a similar amendment. Generally speaking, however, registration laws are upheld on the ground that the state has a right to find out before election who are qualified to vote. Just so the state has a right to find out before the primary election who are qualified to vote at that election and so has a right to require a party enrollment and to prescribe a test to determine party allegiance. The courts differ as to the limits of the power to insist upon registration, some courts holding that the law must give a constitutional elector an opportunity on election day to make up the omission to register, while others hold that the legislature may deny this privilege, even though the failure to register was due to no fault of the elector.[1] The case of *Att'y Gen'l* v. *Detroit*[2] well states the former and *People* v. *Hoffman*[3] the latter position. The courts will probably differ also as to the extent of the power of the legislature to pass enrollment laws in regard to primary elections. The fundamental principle involved, however, is clear. The constitutional elector has a right to participate in his party primaries. Any legislation which denies or abridges this right is void. The legislature has, however, the right to make reasonable regulations concerning this right, but these regulations must be just, reasonable, uniform and unpartial. As said by the Michigan court in *Att'y Gen'l* v. *Detroit:*[4]—

"The power of the legislature in such cases is limited to laws regulating the enjoyment of the right by facilitating its lawful exercise and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction."

It is provided in Kentucky and New York and possibly other states[5] that when electors register they may also enroll themselves as members of some party. Only persons thus enrolled may participate in party elections. This is manifestly a constitutional regulation.

Besides requiring an enrollment, the legislature has the right to prescribe a test to determine party allegiance. This would doubtless be unconstitutional if attempted in regard to a final election, but it is constitutional in primary elections because no elector

[1] See Mechem, Public Officers, p. 86 and cases there cited; also Am. and Eng. Encyclopedia of Law "Electors" page 617 and cases there. cited.

[2] 78 Mich. 545.

[3] 116 Ill, 587.

[4] 78 Mich. 545.

[5] Connecticut has passed a law providing that only enrolled voters shall participate in party elections after 1902.

has a right to vote in any but *his* party primaries, and the state has a right to find out who are thus qualified and to see to it that those not qualified are not allowed to vote. The limitation on this power must be that it go no further than to prescribe a test that will keep those from voting at a party election who are not members of that party; a test that goes further than this is clearly void.

What is such a test?

The Massachusetts law forbids any one to vote at a party primary who has taken part in the primary of another party within twelve months. This was upheld as being a reasonable test.[1]

By the New York law the elector must declare that he is in general sympathy with the principles of the party at whose primary he desires to vote; that it is his intention to support generally at the next general election, state or national, the nominees of such party; and *that he has not enrolled with or participated in any primary election or convention of any other party since the first day of the preceding year.*

The Illinois act provides that:—

"The person offering to vote must be a member of the particular party and he shall not be deemed a member if he has signed the petition for the nomination of an independent candidate to be voted for at the next regular election or if he has voted at the primary election of another party within the period of one year next preceding." [2]

The recent statute of Indiana has a somewhat similar provision.[3]

Mr. Bryce says that the usual test adopted by parties is:—

"Did the claimant vote the party ticket at the last important election, generally the presidential election, or that for state governorship?" [4]

From this it is evident that past action is generally accepted as a reasonable test to determine party membership. It seems strange, however, that it has never been questioned. "Party belongings," as Godkin says, "are matters of opinion, and it is against public policy to throw obstacles in the way of any citizen going freely from one party to another." It certainly is a man's constitutional privilege to join a party at any time. He may cease to be a Democrat and become a Republican in a moment. Whether a man belongs to this party or that depends not upon how he voted a year ago, but how he intends to vote in the present and future. The only reasonable test therefore of determining a man's party would seem

[1] Commonwealth *v.* Rogers,—Mass.—, 63 N. E. 423.

[2] Laws of Ill. 1901, ch. 172.

[3] Laws of Ind. 1901, ch. 219.

[4] 2 Bryce Am. Com. ch. 60, p. 55.

to be, not past action, but present intention and sympathy. To say that a man who now sympathizes with one party and intends to support and vote that ticket, shall be denied a share in the nomination of that ticket because perchance he voted another party ticket one or two years previous, is surely very near, if not actually, denying him a constitutional right. If it be conceded, as I think it must, that the right to vote includes the right to nominate and that neither the legislature nor a party can legally deny a constitutional elector, who is a member of a party a right to vote at that party's primaries, it would seem to follow that to make past action a test is unconstitutional. It must be said, however, that thus far this question has not been raised and so there is no support for this position in the court decisions.

Future intention, has, however, been made the test in some states. This is the case in the new primary law of California. The more recent law of Connecticut providing for enrollment, allows the voter to enroll in any party and so vote in its primaries.

Florida in 1901 passed a law providing that "only lawful electors who have paid their poll tax ten days previous may vote at primaries."[1] This is valid in Florida because the constitution of that state provides that "the legislature shall have power to make payment of taxes a perquisite of voting," but in states where no such constitutional provision is found such legislation would be clearly unconstitutional.

In regulating political parties and their primaries, therefore, the legislature is limited by the express words of most constitutions in three ways:—

1. Legislation must not be local or special.

2. Legislation must not discriminate unreasonably between political parties.

3. Legislation must not deny or abridge the constitutional right to vote.

IV. The remaining question is the most difficult as well as the most important one. Are there any limitations upon the power of the legislature to control political parties and primaries aside from those found expressly stated in the state or federal constitution? It is claimed that there are. These limitations are of two kinds:—

1. These fundamental axioms of civil and political liberty which lie at the basis of republican government.

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[1] Laws of 1901, ch. 130.

2. Those restrictions which the constitution, though not expressly, yet impliedly contains.

The question involved in the first proposition is one of the most important and far reaching questions in constitutional law. It is, says, Dean Lewis, "the next great question of constitutional law."[1] Have the courts a right to declare an act of a state legislature void because it contravenes, not the express words of the constitution, but those fundamental principles of liberty that lie back of all constitutions?

The majority of the people as well as the large majority of the courts deny the existence of any such power.

They contend that the legislature of a state has all power not expressly denied it by either the state or federal constitution; that the federal constitution is a grant of power to congress, but that the state constitution is a limitation upon the power of the state legislature. They insist, therefore, that no court has a right to declare void a legislative enactment on the ground of violation of fundamental rights; that such an act is "a usurpation of power by the court without even colorable warrant." A large number of cases might be cited in support of this position. Some have gone so far as to declare, as did the South Carolina court many years ago, that in the absence of constitutional inhibition a state may take private property for private use and private property for public use without compensation.[2]

A recent case in Alabama well states the position of those courts which deny the doctrine of fundamental rights. In *Sheppard* v. *Dowling*,[3] the court said:—

"Much is said by appellant in his argument to the general effect that though the establishment of dispensaries for the exclusive sale of liquors as proposed by this act may not be in violation of the letter or spirit of any ordinance of the state or federal constitution, yet that these organic government charters do not contain all the liberties and guarantees of the people, and that we have a vast reserve of such liberty not found in any written constitution and which by the very nature of the case could not be put in any written constitution and that this act trenches upon this reserve of unexpounded and unformulated right which the legislature though not inhibited therefrom by the organic law, is without power to interfere with. It will suffice, in reply to all this to say that this court is committed to the doctrine that

[1] 32 Am. Law Register, 782.

[2] State *v.* Dawson, 3 Hill L. (S. C.) 100; Patrick *v.* Cross Roads Commissioners, 4 McCord, 541; Stark *v.* McGowen, 1 Nott & McCord (S. C.), 2, 385; also Harvey *v.* Thomas, 10 Watts 66 (Penn.), 36 Am. Dec. 141.

[3] 28 South, 791 (1900).

the constitution of the state, and the constitution of the United States so far as it has any application, are not the sources of the legislative power residing in the general assembly of Alabama, nor in any sense grants of power to the legislature, but only limitations upon that power and apart from the limitations imposed by these fundamental charts of government, the power of the legislature has no bounds and is as plenary as that of the British parliament."

This theory is not, however, held by all, nor is it, we believe, the true theory. There are courts and writers, few in number, possibly, but certainly high in quality who strongly deny this doctrine of the unlimited power of state legislatures. They insist that there are fundamental rights aside from all constitutions which are a limitation upon the power of the legislature. This position is probably best stated in a dissenting opinion by Justice Brewer, which he gave in the case of *State* v. *Nemaha County*,[1] when a member of the Kansas supreme court:—

"The object of the constitution in a free government is to grant not withdraw power. The habit of regarding the legislature as inherently omnipotent and looking at what express restrictions the constitution has placed upon its action is dangerous and tends to error. Rather regarding first those essential truths, those axioms of civil and political liberty upon which all free governments are founded; and secondly, statements of principle in the bill of rights upon which the governmental structure is reared, we may then properly inquire what power the words of the constitution—the terms of the grant—convey."

This is what Mr. McMurtrie calls the "new canon of constitutional interpretation." He sees in it such danger that he thinks it "warrants an amendment restricting the power of the judiciary as to all such questions, if the state is to remain free."[2]

It is difficult to see on what grounds Mr. McMurtrie calls this interpretation new. As Dean Lewis has said:—

"Undoubtedly the quantity and quality of judicial opinion prior to the days of Taney, is in favor of what Mr. McMurtrie calls the new canon of constitutional interpretation, viz.: that a statute interfering with natural rights must be shown to be authorized, not that it must be shown to be prohibited."

During the last half of the eighteenth and the beginning of the nineteenth century, due probably to the influence of the French philosophy and the prevalence of the "social compact" idea, it was almost universally held that a state legislature could not pass a law against what was called, "natural justice." *Trevett* v. *Weeden*, decided by the supreme court of Rhode Island in 1786, which is cited by Judge Cooley as the first well authenticated case wherein

[1] 7 Kansas, 554.

[2] 33 Am. Law Register, 512.

the courts declared a legislative act void, as being contrary to the state constitution, is in reality not such an instance at all, but rather, an example of the principle we are discussing, for Rhode Island had no constitution at this time, but was under the old charter, which had no other force than that of common acquiescence or statutory provision.

In 1789, in the case of *Bowman* v. *Middleton*, the supreme court said:—

"That the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta. Therefore the act was *ipso facto* void."[1]

Since Taney's day until recently the opposite doctrine held full sway. Of late the original doctrine has been adopted by some courts. It is new in the sense that it is different from that generally held. It is old in the sense that it was held a century ago. Not only was this doctrine held by the early courts, but it has received the sanction of some of our ablest jurists. Justice Story in *Wilkinson* v. *Leland*,[2] says:—

"The fundamental maxims of free governments seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them . . . lurked under any general grant of legislative authority or ought to be implied from any general expression of the will of the people."

Said Chief Justice Marshall in *Fletcher* v. *Peck*[3]:—

"It may well be doubted whether the nature of society and government does not prescribe some limits to legislative power."

Said Justice Miller in *Loan Association* v. *Topeka*,[4]:—

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judical branches of these governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

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[1] Ham *v.* McClaws (1789), 1 Bay 93; Bowman *v.* Middleton (1792), 1 Bay 252; Young *v.* McKenzie (1847), 3 Kelly (Ga.) 31; Parham *v.* The Justices (1851), 9 Ga. 341; Bristol *v.* New Chester (1826), 3 N. H. 535; Crenshaw *v.* The Slate River Co. (1828), 6 Rand (Va.) 245. From a reading of these cases the prevalence of this doctrine in the early decisions will be seen. See also 17 L. R. A. 838, and Am. Law Reg. 32, 971.

[2] 2 Pet. 657.

[3] 6 Cr. 87.

[4] 20 Wall. 663.

Said Judge Ranney, one of the greatest of Ohio's judges, in *Cass* v. *Dillon*[1]:—

"First among them in order,—and first also in importance—is the great political truth, that sovereignty belongs only to the mass of the community. . . In extended communities, for obvious reasons, the direct exercise of this power becomes impracticable, and this has led to the institution of a subordinate agency called the government, intrusted for the time being, with the exercise of such sovereign power and only such as is clearly expressed in the instrument of delegation, the constitution. This seems very plain, and almost too plain to need this formal statement; yet it is forgotten or disregarded, as often as the argument is advanced, that a legislative act can only be treated as inoperative when expressly prohibited by some clause or section in the constitution. Hence this court has held, that it is always legitimate to insist that a legislative enactment, drawn in question, is invalid, either because it does not fall within the general grant of power to that body, or because it is prohibited by some provision of the constitution; and if the former is made to appear it is clearly as void as though expressly prohibited."

The last expression of this doctrine is in *Lexington* v. *Thompson*,[2] a Kentucky case decided in 1902. The syllabus of that case reads:—

"State legislatures are subject to implied restrictions and therefore the act of the legislature may be declared void, though not expressly prohibited by the constitution."[3]

This then is the doctrine that is considered such a "usurpation of power"—and so full of danger to the freedom of the state. Without doubt there is danger in the doctrine, for once admit that the court may set aside legislative acts for other reasons than that they contravene the express or implied inhibition of the constitution and you have seemingly given them a power that is limited only by their own discretion. No doubt courts have, at times, gone beyond all limits in exercising this power, making of themselves a branch of the legislature and exercising the veto under the guise of declaring the law unconstitutional. This, however, does not prove that the doctrine is false, for the same criticism may be applied to the courts in their determination of what is "reasonable regulation," and what is "due process of law."

This doctrine can be sustained on two grounds:—

1. Political necessity.
2. Constitutional right.

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[1] Dissenting opinion, 2 O. S. 629.

[2] 68 S. W. 477, 57 L. R. A. 775, 1 Michigan Law Review, 416 (1902).

[3] This decision follows People *v.* Hurlbut, 24 Mich. 94, in declaring legislation void which denies the right of local self-government.

The right of courts to do certain things on the ground of political necessity, is not an argument that appeals to constitutional lawyers as it does to students of politics, but this question is as much one of political science as it is of law. Judges must be statesmen as well as lawyers. The matter of ethics plays a much larger part in the realm of constitutional law than is ordinarily thought. As Mr. J. C. Gray has said:[1] "Few constitutional questions have been decided because the rules of logic necessitated the results reached." As has been suggested, this whole question is but another form of the old strict and loose construction of the constitution. Then the courts adopted a construction that made possible the growth of our nation. They are now adopting a construction that will protect the individual in his personal rights against the action of the state legislatures. It is not meant by this that the courts are justified in usurping power, or doing violence to the constitution. What is meant is that when the courts have the choice of two lines of reasoning (which they so often have in matters of constitutional law), both logical, but leading to different conclusions, they have a right to be guided, as they doubtless are, by question of ethics and policy. It is therefore perfectly proper for a court to adopt one construction under certain political conditions, and another construction when those conditions are changed.

This has a direct application to the question we are discussing.

The decadence of the legislature is one of the marked features of our time.

"At present," says Mr. Godkin, "as far as one can see, the democratic world is filled with distrust and dislike of its parliaments, and submits to them only under the pressure of stern necessity."

Again he says:—

"That the present legislative system of democracy will not last long, there are abundant signs, but in what way it will be got rid of, or what will take its place or how soon democratic communities will utterly tire of it, he would be a rash speculator who would venture to say confidently."[2]

A growing distrust of the legislature is evidenced in the constitution making of every American state. Alabama, in her recent constitution, substitutes a quadrennial for a biennial session of her legislature and limits the regular session to fifty days. Four new constitutions have been adopted since 1894, and they all are greatly

[1] 6 Harvard Law Review, 42.

[2] Unforeseen Tendencies of Democracy, 138.

increased in size on account of the added restrictions put upon the legislatures. The New York constitution of 1894 is three and a half times as long as the former one of 1846. The new constitutions of South Carolina, Delaware and Alabama are about twice as long as the former ones of 1868, 1831 and 1875, respectively, and the Louisiana constitution of 1898 is a third longer than the one of 1879. It is often made a subject of criticism that our state constitutions are too long and contain much that should be left to legislation. There is doubtless some force in this criticism, but there is no question that the people have reason for this action and will continue to put added restrictions in their constitutions upon the power of the legislatures. A century ago the people felt that the state legislatures were the safest depositories of their liberties. The people do not think so to-day. They feel that they need protection against their legislatures.

The demand for the "referendum" is a result of this decadence of the legislature. The attitude of the courts on the question of "fundamental rights" is possibly also such a result. If it be true that individual rights are not protected sufficiently by the political remedies of short sessions and popular elections, the courts are justified in adopting a construction of the constitution which will afford that protection, if such construction be logical and not violative of the constitution.

No such reasoning, however, is necessary to sustain the doctrine of "fundamental rights."

The courts surely are justified in saying that all government in this country is delegated. Sovereignty here resides in the people, not in the parliament as in England.

"The body politic is the source of all authority: the government is the agent or trustee it creates, and to which it delegates power. The one is the delegating sovereignity, the other is the delegated trustee. The one is omnipotent, the other limited in power."[1]

[1] J. Randolph Tucker, Am. Bar Asso. 1892-221.

Prof. Burgess has done much to make this matter clear. Says he: "I think the difficulty which lies in the way of the general acceptance by publicists of the principle of the sovereignty of the state is the fact that they do not sufficiently distinguish the state from the government. They see the danger to industrial liberty of recognizing an unlimited power in the government, and they immediately conclude that the same danger exists if the sovereignty of the state be recognized. This is especially true of the European publicists, most especially of the German publicists. They are accustomed to no other organization of the state than the government. In America, we have a great advantage in regard to this subject. With us the government is not the sovereign organization of the state. Back of the government lies the constitution, and back of the constitution, the original sovereign state, which ordains the constitution, both of government and of liberty. We have the distinction already in objective reality, and if we only cease for a moment conning our European masters and exercise a little independent reflection, we shall be able to grasp this important distinction clearly and sharply." (Political Science and Constitutional Law, I, page 57.)

This being so, the courts must construe the nature of the grant and in doing this must take into consideration many things. The nature of the government to be created, the purposes for creating it, as laid down in the Declaration of Independence must of necessity help to determine the nature and limit of the grant. To argue otherwise and to insist as does the Alabama court that the power of the legislature does not come from the constitution, is to be blind to the history of our country and is to try to apply in this country principles derived from conditions in England, not here. What is not granted need not be denied. Therefore an act of the legislature which is beyond the grant is contrary to the constitution and void. It is true the people in their constitutions made their grant a general one and it may be argued that the people thereby gave to the legislature all the power they themselves possessed, but it is more logical to assume that by no general grant of power did the people give to the legislature the right to do those things which are destructive of the very purposes of the legislature's creation, and of those "essential truths, those axioms of civil and political liberty upon which all free governments are based."

Such a doctrine may be attacked as having "the incurable effect of want of definiteness." If it is meant by this that it cannot be put into a rule that will specify each and every case, we grant it is indefinite. So is "due process of the law" and "reasonable regulation" and many another principles of law that must be determined in specific cases. If it is meant by this that it is intangible and gives the court unlimited power, we deny it. What these "essential truths" are cannot all be enumerated, but enough can be given to prove the truth of the doctrine.

Aside from all constitutional inhibitions no legislature has the power to take private property for private use at all, or for public use without compensation, or to declare that the wife of A shall be the wife of B, or that the homestead now owned by A shall no longer be his but henceforth belong to B, or to punish a citizen for an innocent act, or to make a man a judge in his own case,[1] or to declare that minorities instead of majorities shall prevail at elections.

It is to be doubted if there is a court in this country regardless of its theories which would hesitate to declare such acts of legislation void. There are several states which do not have a constitutional inhibition against taking private property for public use without

[1] Judge Chase in Calder *v.* Bull, 3 Dall. 386.

compensation, but in all of these states save South Carolina the courts have declared such action unconstitutional[1] and in South Carolina subsequent decisions have criticised this holding of the court.[2]

As a matter of fact there are certain fundamental rights upon which all are agreed, and it is but common sense for the courts to say that in it is no general grant of power were these rights given up.

The unwillingness to accept this doctrine comes, I think, from the reaction which set in against the doctrine of "natural rights." Before the days of Bentham and Austin, the great bulk of Englishmen held that sovereignty itself was not unlimited but was limited by the natural rights of man. Due to these two men more than any one else, the doctrine of natural rights in the last fifty years has been completely abandoned and the doctrine ot the unlimitability of sovereignty accepted in its place. A. Lawrence Lowell wisely says:— "That the people are apt to confound sovereignty with political power and to attribute the former to any body which exercises legislative authority."[3]

This has been done in the United States with the result that the courts, falling under the influence of this reaction against the doctrine of natural rights, and confusing sovereignty with political power, have taken the position that the power of a state legislature is unlimited unless specifically inhibited.

As a matter of fact the doctrine of natural rights has no place in this question. Fundamental rights which have slowly grown up through the centuries, as the result of many a battlefield and bloody fight and have come to be recognized as such are a very different thing from heaven-born, inherent natural rights. The doctrine of natural rights has "passed the boards" and rightly so. It is one thing to say that men have natural rights as against sovereignty. It is another and altogether different thing to say that as against a

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[1] Exparte Martin, 13 Ark. 198.
Cairo & F. R. Co. *v.* Turner, 31 Ark. 500.
Re. Mt. Washington Road Co. 35 N. H. 134.
Piscatoqua Bridge Proprs. *v.* N. H. Bridge Co., 7 N. H. 35.
Bradshaw *v.* Rogers, 20 Johns (N. Y.) 103.
Bonaparte *v.* Camden & A. R. Co., Baldwin 220,
Harners *v.* Chesapeake & C. Canal Co., 1 Md. Ch. 248.
Henry *v.* Dubuque & P. R. Co. 10 Iowa 543.
See 17 L. R. A. 839.

[2] See Annotated Case, L. R. A. 17-838, note.

[3] 2 Harvard Law Review, 71.

legislature of delegated power the people have certain general y accepted fundamental rights, which may not be violated. It is only because these two things are confused that men deny the latter statement.

The courts have had no difficulty in coming to the conclusion (nor has their conclusion ever been criticised) that the state has no right to tax a federal agency, or the federal government, a state agency. They came to this conclusion, not because there are any inhibitions upon the power to tax federal agencies to be found in the state constitutions, express or implied, but because it must be assumed that the people who called into being both the state and federal governments did not give to either the power to destroy the other, and the power to tax is the power to destroy. Here is an instance where it is generally recognized that in spite of the general grant, it must be assumed that there is something that was not granted. The principle here established may be applied with equal reason to fundamental rights.

A second kind of limitation upon the power of the state legislature other than that found expressly stated in the constitution are those limitations which the constitution implies but does not express.

There are courts and writers who deny these limitations, but the number is not large. There are many who deny the doctrine of "fundamental rights" who accept the doctrine of "implied limitations." Says Mr. Cary in an address before the American Bar Association:—

"The modern and perhaps the better doctrine is that courts cannot interfere with legislation or declare it void, except where it conflicts with the express or implied provisions of the constitution: that the legislative power has no other limitation"[1]

Judge Cooley might also be said to hold this middle position, though it is difficult to know just where he did stand on this question. It is not surprising to find courts and counsel on both sides of this question, quoting Judge Cooley. In one place he says:—

"If in one department was vested the whole power of the government, it might be essential in the instrument delegating this complete authority to make careful and particular exception of all those cases which it was intended to exclude from its cognizance; for *without such exceptions the government might do whatever the people themselves, when met in their sovereign capacity would have power to do.*"[2]

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[1] 1892, p. 256.

[2] Constitutional Limit. 6th ed., 207.

Again:—

"The rule of law upon this subject appears to be that except where the constitution has imposed limits upon the legislative power it must be considered as practically absolute."[1]

It is difficult in view of these words to understand his statement that—

"The right of local government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people and as an inseparable incident to republican government."[2]

If this latter statement be true, it is hard to see how the first statement can be true, for the inability to take away the right of local self-government is not put on the ground of the separation of powers, but that it is a generally recognized fundamental right.

The most important of the *implied* limitations of the constitution is found in the separation of powers. Some constitutions expressly forbid one department exercising the functions of the other. This is not necessary, for the separation carries with it this implication. To the general assembly is given all legislative power. This grant implies that acts that are not legislation are not within the power of the general assembly. The courts have seized upon this to declare void much iniquitous legislation on the ground that it is not legislation, but "*arbitrary fiat.*" Says Judge Bronson in *Taylor* v. *Porter*:—

"It is readily admitted that the two houses, subject only to the qualified veto of the governor, possesses all the legislative power of the State, but the question immediately presents itself, what is the legislative power and how far does it extend?"[3]

Another implied restriction grows out of the fact that the constitutions recognize the existence of majorities and minorities and to this extent at least recognize political parties. This will be spoken of more fully again.

In connection with these two kinds of limitations should be borne in mind another principle and that is that the courts should not declare a law void unless they are very sure that it is unconstitutional. This principle has been denied by some very able men like Justice Gibson,[4] Jeremiah Mason,[5] and Daniel Webster,[6]

[1] Constitutional Limitations, (6th ed.) 200

[2] Constitutional Limitation s, 207.

[3] 4 Hill 144.

[4] Eakin *v.* Raub, 12 S. & R. 330.

[5] Dartmouth College Case.

[6] Charles River Bridge Case, 7 Pick. 344.

who insisted that an individual whose rights are involved has a right to demand that the courts shall set aside the law if the preponderance of conviction be against its constitutionality.[1]

It should always be remembered that the courts were not made the chief protection against legislative violation of the constitution. James Wilson and others in the Framers' Convention urged that the Supreme Court be joined with the President in the veto power, but this, like all other such plans was voted down. The power of the courts to set aside unconstitutional laws is an incidental and postponed power, arising, not out of any express grant, but from the necessities of the case. Doubtless there were some in the convention who foresaw that this power would belong to the courts, but they were few in number and they saw it but through a glass darkened.[2]

If they had intended that the courts should constitute the great check upon unconstitutional legislation they would have given them the power to pass upon laws before they went into operation and thus have avoided the unfortunate condition we are now in of having laws enforced for years and then liable to be declared unconstitutional and all acts done under them void.

The courts have, therefore, held as a unit, that a legislative act

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[1] Prof. Thayer read a very interesting paper before the Congress on Jurisprudence and Law Reform in Chicago in 1893, upon this subject. He attaches much significance to this principle, saying:

"The view which has thus been presented seems to me highly important. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than we have of the great range of possible harm and evil that our system leaves open to the legislatures, and of the clear limits of judicial power. . . . Under no system can the power of courts go far to save a people from ruin. Our chief protection lies elsewhere."

[2] The following members of the convention of 1787 made remarks showing that they had some idea at least that the courts would exercise this power:

Gerry, Elliotts' Debates (2nd Ed.) V. 151.

Gouverneur Morris, ibid V. 321, 429.

Sherman, ibid V. 321.

Wilson, ibid V. 344.

Geo. Mason, ibid 347.

Luther Martin, ibid 346.

The following members expressed themselves as not believing that the courts had such power:

Dickinson, Elliot's Debates V. 429.

Mercer, Elliott's Debates V. 429.

See an able discussion of this subject in Wm. M. Meig's article, "Relation of the Judiciary to the Constitution," 19 Am. Law Review, 175.

must be upheld unless there is no reasonable doubt that it is unconstitutional. The fact that a court sustains a law does not mean that the court necessarily considers the law to be constitutional. As Judge Cooley says, a man may, as a legislator, vote against a bill because he doubts its constitutionality and yet as a judge sustain the law, though he has in no wise changed his mind.[1]

This principle has much influence on the question of implied limitations on the legislative power, for no court should declare a legislative act void on the ground that it violates either fundamental rights or implied restrictions unless they are convinced that the rights are so fundamental and generally accepted or the restrictions so clearly implied in the constitution that there is no reasonable doubt about it.

What application has all this to the power of a legislature to control political parties and their primaries? Very great. It is contended that political parties as such, have rights which arise not from constitutions but are reserved and fundamental and that the legislature in regulating primaries and parties must not trench upon these rights. It was upon this ground that the California court declared the primary law of 1897 invalid in the case of *Britton* v. *Board of Election Commissioners*. Said the court in this case:[2]—

"It is further contended against this law that in its present form it works an unwarranted invasion of the rights of political parties.

"No one can be so ignorant as not to appreciate the value—indeed the necessity—of opposing political parties in a government such as ours. . . . No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. *Such a right is fundamental.* It is inherent in the very form and substance of our government and needs no expression in its constitution . . . . Active political parties, parties in opposition to the dominant political party, are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs on governmental principles to advocate their views through party organization cannot be denied. As has been said: 'Self-preservation is an inherent right of political parties as well as of individuals' (*Whipple* v. *Broad*, 25 Colorado 407). A law which will destroy said party organization, or permit it frauduently to pass into the hands of its political enemies, cannot be upheld."

The court therefore held the law unconstitutional because it did not provide any test for the person wishing to vote at a primary, thus

[1] Const. Limit., 6th ed., 68.

[2] 129 Cal. 337.

allowing democrats to vote at republican primaries and vice versa:

"A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights."

If the reasoning here be sound we have a very important limitation upon the power of the legislature to control political parties and if the reasoning of this paper be sound this limitation must be said to exist.

The right of political parties to exist and to preserve their existence is a right which must be respected by the legislature, both because it is a "fundamental right" and as well because it is impliedly recognized by the constitution. The right of the majority to rule must be said to be one of the "essential truths, one of the axioms of civil and political liberty upon which all free governments are founded."

"The first great principle underlying our republican liberty and government is that the majority must rule."[1]

This does not need to be written in constitutions to be a limitation of the legislative power. As said before, a law that would provide that minorities not majorities should prevail at elections would be clearly invalid. The constitution of Illinois provides for minority representation in the General Assembly, but says Mr. Kretzinger in an address before the Bar Association of that state in 1892:—

"I confidently assert that no intelligent court would hold that, without this express constitutional permission, the legislature could pass a valid law providing for minority representation in our General Assembly."

In the recent case of *State ex rel Bowden* v. *Bedell*[2] the court questions the power of the legislature to provide that "no more than three members of the board (excise commissioners) shall belong to the same political party." Such a clause says the court is "open to grave doubts as to its constitutionality." The ground upon which the court bases its doubts is not the one we are discussing, but the constitutionality of such a clause may be questioned on the ground that it denies to the majority their right to say who shall hold the offices. If the majority of the people at an election want five republicans or five democrats to constitute a board, it may be questioned whether the legislature may deny them that right and say that the minority shall decide who two of the five shall be. It may be answered that giving to the majority the right to say who three of the five shall

[1] Mr. Kretzinger. Illinois Bar Assn. 1892 p. 165.

[2] 1 MICHIGAN LAW REVIEW 409, 53 Atlantic Rep. 198 (1902).

be, satisfies the principle that the majority shall rule since the three will control the board. This may be true, but whether so or not. the principle that the "majority have a right to rule" must be recognized as a fundamental right which the legislature may no deny. Surely a law, if such a law were possible, that provided that the minority should choose the three and the majority the two out of the five would be invalid. And so would a law for the same reason, that provided that the governor representing one party must appoint a majority of a board from another party.

The right of the majority to rule, however, means more than what the mere words indicate. When we say the majority have a right to rule, we recognize the fact that there are bodies of men constituting a majority and bodies of men constituting minorities, each striving for victory. Who will be the majority cannot be determined until the contest is over. Each body of men has a right to strive to be the majority and to use all reasonable means to accomplish that end. Each body of men therefore has a right to organize into a political party for the purpose of "carrying their principles of government into active operation through the suffrage of these fellows." To deny this right is to deny the right of the "majority to rule."

Political parties are not, however, dependent on the fundamental "right to exist." The various constitutions recognize this right also. These constitutions in their bill of rights announce that the people "have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient." [1] They make careful provision for amendments and for elections. All this necessarily implies the recognition that there will be majorities and minorities; bodies of men favoring one policy and bodies of men favoring other policies, each striving for victory at the elections. As seen above, this means the recognition of political parties. When, in connection with this we have the constitutional as well as the fundamental right of the people to assemble together for the petition of grievances and the constitutional right of the electors to vote, which includes the right to nominate, we have, I think, clear proof that the constitutions impliedly recognize the right of political parties to exist. The right to exist carries with it the right to preserve that existence and when we remember what a political party is, we see at once that any such legislation as that attempted by the California legislature must be void.

[1] Alabama constitution.

Dr. Clarke, of Oswego (N. Y.) has a plan which he has for many years, says Mr. E. L. Godkin, tried to have enacted into law. It is a plan for the nomination of municipal officers. It provides that in every municipality certain groups of 100 electors shall be chosen by lot. These groups shall each nominate a ticket and from these tickets so nominated, the electors shall choose the municipal officers.

From the point of view of expediency this plan has much to be said in its favor, but surely such a denial of the right of the people to organize into political parties for the purpose of nominating a candidate who represents their political belief, is fatal to its constitutionality.[1]

What are the rights of political parties that the legislature must not invade? They have already been indicated. The right to exist as political parties and to preserve their existence as such. Whatever is necessary for this; whatever degree of self-control it calls for and nothing more must be respected.

In thus attempting to find out the basic principles which govern this legislative power we have but torn away the rubbish, revealing the strength of the buttress. The power of the legislature over political parties and their primaries is great. The exercise of that power is moreover much needed. The "convention" has no constitutional or extra-constitutional protection.

Not only should the primaries be controlled so as to prevent fraud and possibly "direct nominations" be provided for by law, but as well should "political parties" be entirely "legalized."

The work done by them has become so important that they should no longer continue to be "irresponsible, voluntary associations" but should be recognized as being what they really are—quasi legal bodies.

In dealing with political parties, however, the legislature must always bear in mind that while their power is great, it is not unlimited, that they are bound by the implied and express provision of the constitution and as well by those "essential truths, those axioms of civil and political liberty upon which all free governments are founded."

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[1] The fact that a municipality is a pure creature of the legislature might possibly affect this conclusion as to officers who are not state officers.